

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 30, 2007 Session

STATE OF TENNESSEE V. LARRY D. LAFORCE, II

**Appeal from the Criminal Court for Hamblen County
Nos. 06CR389 & 06CR390 John Dugger, Jr., Judge**

No. E2007-00334-CCA-R3-CD - Filed February 27, 2008

The defendant, Larry D. LaForce, II, appeals as of right from his jury conviction in the Hamblen County Criminal Court for coercion of a witness, a Class D felony, for which he received a sentence of three years as a Range I, standard offender. On appeal, the defendant contends that the evidence is insufficient to support his conviction. Additionally, he claims that the trial court erred in denying his motion to sever offenses, that the trial court committed plain error in instructing the jury regarding the elements of coercion of a witness, that the trial court erred in instructing the jury regarding the dismissal of the aggravated assault charge, and that the cumulative effect of the errors resulted in a denial of due process which denied the defendant of his right to a fair trial. The state argues that the evidence is sufficient to support the conviction for coercion of a witness, that the trial court correctly denied the motion for severance, and that the trial court instructed the jury properly. Additionally, the state alleges that the trial court erred in dismissing the aggravated assault charge on variance grounds. Following our review, we conclude that the trial court erred in dismissing the aggravated assault charge and that none of the defendant's allegations of error merit relief. Therefore, the judgment of the criminal court is affirmed in part and reversed in part; the case is remanded for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed in Part; Reversed in Part; Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

Edward R. Sempkowski, Morristown, Tennessee, attorney for appellant, Larry D. LaForce, II.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; C. Berkeley Bell, District Attorney General; and Victor Vaughn, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The defendant was charged with prescription fraud, aggravated assault, retaliation for past action, and coercion of a witness in two separate indictments. Count One of Indictment Number 06CR389 alleges that the defendant committed prescription fraud on April 7, 2006. Count Two of the same indictment alleges that the defendant committed aggravated assault by a deadly weapon upon Darrelyn Melissa Turner on the same day, April 7, 2006. Indictment Number 06CR390 alleges counts of retaliation for past action and coercion of a witness arising from the defendant's behavior towards Turner and Detective Michael Hurt after the completion of the preliminary hearing on the prescription fraud charge.¹

Annabeth Portrum, a pharmacist at Minnis Drug Store, testified that she had been a pharmacist for fifteen years and, over the years, had become familiar with the handwriting of various physicians in town. Portrum identified a prescription written to Darrelyn Turner for a stomach medicine that contained an additional order for Oxycontin. The practitioner had written the prescription with a line above and below the stomach medicine – an indication that nothing should be added to it. Based upon this notation, Portrum recognized that the prescription had been altered. She also noted that the handwriting for the Oxycontin differed from that of the stomach medicine. Upon receiving the prescription, Portrum telephoned the practitioner's office, confirmed that it had been altered, and immediately telephoned the police. She recalled that she saw the defendant and Turner discussing the matter with the police later outside the pharmacy. On cross-examination, she acknowledged that she did not know who presented the prescription or who altered the prescription because she was not working at the front counter when the prescription was presented.

Morristown Police Department Officer Ronald Sanchez testified that he was called to Minnis Drug Store on April 7, 2006 to investigate a forged prescription. Upon his arrival, Turner was standing outside the store and the defendant was seated in a vehicle in the parking lot. After obtaining their identification to perform a warrants check, he called a detective to the scene. Detective Michael Hurt arrived to discuss the matter with the pharmacist. Detective Hurt directed Officer Sanchez to place the defendant and Turner under arrest and Officer Sanchez transported the defendant to the police department where detectives questioned him further.

Melissa Turner testified that she met the defendant through a mutual friend in January or February 2006. She recalled that the defendant would come to her house to buy Oxycontin. She denied purchasing a vehicle from the defendant, but admitted that she gave the defendant a check for one hundred and fifty dollars on April 6, 2006, to purchase five forty-milligram pills of Oxycontin. She acknowledged that she was addicted to Oxycontin in April 2006 and that "anybody that was around [her] probably knew" about her addiction. She testified that the defendant called her about getting more pills on April 7. She recalled that she went to the doctor for strep throat

¹ As an additional note, the defendant's original counsel was also involved in the incident and required to be removed in handcuffs from the Hamblen County Clerk's Office.

hoping to get a prescription for Oxycontin, but was told she could not receive any more pills until April 16.

Turner testified that the defendant drove her to the doctor on April 7 and that he took her home before going to the pharmacy. She testified that she placed the prescription on a table when she arrived at her house. Later, they went to the pharmacy to get her prescription filled and she noticed that Oxycontin had been added to the prescription. Nevertheless, Turner presented the prescription to the pharmacy. She added that she had pled guilty to the offense, receiving three months in jail followed by house arrest and drug rehabilitation. Turner testified that the defendant came into the pharmacy with her and that he intended to pay for the prescriptions. She said that they waited for about fifteen minutes and realized there was a problem when the police arrived. Turner testified that Detective Hurt questioned her at the police station and that she recounted the events consistent to her testimony at trial. She was placed under arrest and made bond.

Relative to the aggravated assault charge, Turner recalled that the defendant and his girlfriend came to her house the next day, April 8, 2006. The defendant's girlfriend came to her door to tell her that the defendant needed to talk to her outside about what she had told the police. Turner told them that they should not be at her home and that they needed to leave. She said that when the defendant got out of his car, she could see the handle of a pistol in his front pants pocket. She testified that she was afraid because the defendant had already left threatening messages on her cell phone saying that "he would f*** me up, and that he didn't care if my little girl was there, he would put a bullet in the back of mine and [my daughter's] head." While at her house, he told her that she needed to keep her mouth shut. She testified at trial regarding her fear that day and her continued fear of the defendant at trial.

Regarding the charge for coercion of a witness, Turner testified that the defendant approached her after his preliminary hearing on the prescription fraud charge and said, "You're dead" on his way from the courtroom. On cross-examination, she acknowledged that the statement that was the basis of the warrant indicated that the defendant told her, "You've had it." She explained that the defendant had threatened her so much that maybe the reference to "you're dead" were not the defendant's "exact words." She acknowledged five forgery convictions, in addition to the conviction for prescription fraud related to the present offenses. She also admitted to selling Oxycontin several times but "less than ten probably." She denied altering the prescription to include Oxycontin and also acknowledged that she never saw the defendant alter the prescription. She testified that the defendant left several threatening messages on her cell phone which she gave to the police as part of their investigation. The messages included threats to "put a bullet in the back of [her] head" and to "cut [her] throat."

Randy Eddington, Turner's brother, testified that he was at his sister's house on April 7 or 8 when the defendant and his girlfriend came by. He recalled hearing a man say that "he wanted to cut [his sister's] G.D. throat." He went outside to see who had said that and saw the defendant. Eddington related that when he walked outside, the defendant "backed off the porch and he started

hollering for [his girlfriend] to, Come on, let's go." He stated that he had never met the defendant or his girlfriend before that day but that they were the only people outside when he went to the porch.

Morristown Police Department Detective Michael Hurt testified that, as a narcotics officer, he investigated prescription fraud cases. He stated that he interviewed the defendant after he was questioned at Minnis Drug Store on April 7. As a result of the interview, the defendant was charged with prescription fraud. He recalled that he spoke with Turner regarding the aggravated assault incident after she contacted him on April 26. He also indicated that the defendant was not charged with aggravated assault until after the preliminary hearing. Detective Hurt overheard the statements the defendant made to Turner while leaving the preliminary hearing and escorted her immediately to the clerk's office to assist her in taking out a warrant against the defendant. While they were in clerk's office, the defendant entered with his original attorney and began threatening Detective Hurt by telling him that if he removed his badge and gun, the defendant would "kick [his] butt or hurt [him]." Based upon this conduct, the defendant was additionally charged with retaliation for past action.

Detective Hurt acknowledged on cross-examination that he had not processed the prescription for fingerprint analysis, but he reiterated that the defendant was charged with prescription fraud based upon Turner's statement as well as his assistance in driving her to the pharmacy, his continued presence at the pharmacy, and his possession of the money to pay for the prescription had it been filled. Detective Hurt acknowledged that he had met the defendant briefly at a Knoxville restaurant a few months before the pharmacy incident, but denied that any harsh words were exchanged between the two men. He further related that he had gone to high school with the defendant's girlfriend, Kennetha Spencer.

The thirty-five-year-old defendant testified that he lives with his parents. He stated that he attended World Harvest Bible College with the intention to become a youth pastor, but instead opened a car dealership with his father. He stated that Turner contacted him about a week before the incident at Minnis Drug Store because she was interested in purchasing one of his cars. He testified that Turner wrote him a check for a deposit on the vehicle and asked him to hold it for her until her income tax refund arrived. He recalled that Turner had several checkbooks so he became suspicious and, upon inquiry with the bank, learned that the check was no good. The defendant stated that Turner asked him to take her to the doctor on April 7 and he agreed because he wanted to talk to her about the check and her purchase of the vehicle. After the doctor appointment, Turner asked him to take her to the drug store. He denied seeing a prescription in her hand. After waiting outside for several minutes, the defendant entered the pharmacy to ask Turner what was the cause of the delay. She told him that her prescription was being filled so he sat down with her. When the police arrived at the pharmacy, the defendant denied all knowledge of the prescription. He also denied making any threatening statements to either Turner or Detective Hurt on the day of the preliminary hearing. He stated that he had met Detective Hurt a few months earlier at a Knoxville restaurant and that he asked him to leave their table because he thought Detective Hurt was flirting with his girlfriend.

Mike Webb, a friend of the defendant, testified that he went with the defendant to Turner's house after Turner contacted the defendant because she was interested in purchasing a vehicle from him. Webb recalled that Turner had several different checkbooks, and he told the defendant that accepting a check from her did not sound like a good idea. He denied ever seeing any drugs exchanged between the defendant and Turner. He also stated that the conversations he heard related only to the purchase of the vehicle.

Kennetha Spencer testified that she and the defendant had been dating for five years. She recalled seeing Detective Hurt while at a Knoxville restaurant some time prior to the incidents. She acknowledged that they went to school together. She said that Detective Hurt borrowed several cigarettes from her and that the defendant "began to get ill" so he went outside to get their car while Spencer had their food boxed up. She stated that neither man was ever outside her hearing and that the two never exchanged any words.

Frank McGuffin testified in rebuttal that he was with Detective Hurt at the restaurant when Spencer approached him to say hello. He described both the defendant and Spencer as "very pleasurable" and stated that there was no unpleasantness at all between anyone that night.

Based upon this evidence, the jury returned a verdict convicting the defendant of coercion of a witness. The jury found the defendant not guilty of prescription fraud and retaliation for past action.² The jury did not consider the aggravated assault count because the trial court granted the defendant's motion for judgment of acquittal at the close of the state's proof based upon its determination that a fatal variance existed between the proof at trial and the date alleged in the aggravated assault indictment.

ANALYSIS

Sufficiency of the Evidence

In his first allegation on appeal, the defendant contends that the evidence is insufficient to support his conviction for coercion of a witness. The crux of this allegation is that Turner's testimony should not be believed based upon her criminal history and various inconsistencies in her testimony. The defendant claims further that there is no proof that any alleged statements made by him were for the purpose of affecting Turner's testimony because, even if the statements are assumed true, none of the statements explicitly directed Turner to testify falsely or to withhold information.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the

² The judgment reflects that the prescription fraud charge was dismissed in conjunction with the aggravated assault charge. However, the verdict return, as well as the transcript, reflects that the jury acquitted the defendant of the prescription fraud charge. Upon remand, the trial court shall correct the judgment to reflect the accurate disposition of this count.

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). The appellate court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn.1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn.1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn.1982).

The essential elements of coercion of a witness, as charged in the indictment, are that the defendant “by means of coercion, influence[d] or attempt[ed] to influence a witness . . . in an official proceeding with intent to influence the witness to withhold any truthful testimony [or] truthful information.” Tenn. Code Ann. § 39-16-507(a)(2). In the light most favorable to the state, the evidence in this case shows that the defendant made threatening remarks to the codefendant/witness as he was leaving the general sessions courtroom immediately after his prescription fraud case had been bound over to the grand jury. Relative to any alleged inconsistencies as to the exact words uttered by the defendant as reported by Turner, the jury resolved those conflicts in her testimony, as was their duty and exclusive province to do. Similarly, any questions regarding her credibility were resolved by the jury as well. The circumstances concerning where and when the threatening statements were made to Turner sufficiently indicate that they were made for the purpose of preventing or influencing any further damaging testimony by her as a witness. As such, there is no requirement that the defendant’s threat explicitly state a request to withhold or change testimony. Therefore, we conclude that the evidence is sufficient to support the defendant’s conviction for coercion of a witness.

Severance of Offenses

The defendant alleges that the trial court erred by denying his motion to sever the offenses. He claims that the trial court incorrectly found that the offenses were part of a common scheme and plan. Additionally, he alleges that a severance became even more necessary after the aggravated assault charge was dismissed at the close of the state’s case. The state counters that the trial court correctly found that the charges were all related as part of a common scheme or plan, to wit: the defendant’s continuing efforts to avoid conviction for the prescription fraud, and that the evidence of each offense was admissible against the other.

The standard of review of a trial court's decision to consolidate or sever offenses is an abuse of discretion. State v. Shirley, 6 S.W.3d 243, 247 (Tenn.1999). An appellate court will not interfere with the exercise of this discretion unless it appears on the face of the record that the accused was prejudiced by the court's ruling. State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App.1982). The decision to grant or deny a severance “depends upon the facts and circumstances involved in the various crimes charged.” State v. Morris, 788 S.W.2d 820, 822 (Tenn. Crim. App.1990). The trial

court is required to hold a pretrial hearing to determine the appropriateness of severance. State v. Hoyt, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995). The trial court must make a determination that the evidence of one crime is relevant to a material issue in the trial of the other. State v. Moore, 6 S.W.3d 235, 239 (Tenn. 1999). The court must then consider whether the probative value of the evidence outweighs any prejudicial effect. Hoyt, 928 S.W.2d at 944.

Rule 8(b) of the Tennessee Rules of Criminal Procedure allows for the permissive joinder of offenses and states that “[t]wo or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character.” Tenn. R. Crim. P. 8(b). Additionally, Rule 13(a) of the Tennessee Rules of Criminal Procedure provides that “[t]he court may order consolidation of two or more indictments, presentments, or informations for trial if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8.” However, Rule 14 of the Tennessee Rules of Criminal Procedure states that “[i]f two or more offenses have been joined or consolidated for trial . . . , the defendant shall have a right to a severance of the offenses *unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.*” Tenn. R. Crim. P. 14(b)(1) (emphasis added). Therefore, in order to deny a motion for severance the trial court must be satisfied in two findings: a common scheme or plan and the admissibility of evidence against one another in separate trials. See State v. Hallock, 875 S.W.2d 285, 289 (Tenn. Crim. App. 1993); see also State v. Tolivar, 117 S.W.3d 216, 227-31 (Tenn. 2003).

The first prong of Rule 14(b)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court find a common scheme or plan. In Tennessee, there are three categories of common scheme or plan evidence: (1) evidence showing a distinctive design or signature crime; (2) evidence demonstrating a larger, continuing plan or conspiracy; and (3) evidence that the offenses are part of the same transaction. Moore, 6 S.W.3d at 240. The trial court in this case found that the offenses constituted a common scheme or plan because the latter offenses were part of a continuing plan to avoid prosecution and conviction for the prescription fraud case. We conclude that the trial court was correct in this finding.

The second prong of Rule 14(b)(1) of the Tennessee Rules of Criminal Procedure is what the Tennessee Supreme Court has deemed the “primary inquiry” in any severance case: whether the evidence of one offense would be admissible in the trial of the other if the two offenses remained severed. State v. Burchfield, 664 S.W.2d 284, 286 (Tenn. 1984). Our supreme court has stated that “[u]nless [it is] expressly tied to a relevant issue, evidence of a common scheme or plan can only serve to encourage the jury to conclude that since the defendant committed the other crime, he also committed the crime charged.” Moore, 6 S.W.3d at 239 n.5 (quoting Hallock 875 S.W.2d at 292). The court has also stated that “a common scheme or plan for severance purposes is the same as a

common scheme or plan for evidentiary purposes.” Moore, 6 S.W.3d at 240 n.7. Therefore, Tennessee Rule of Evidence 404(b) is relevant to our analysis of this issue.

Rule 404(b) excludes evidence of “other crimes, wrongs, or acts” committed by the defendant when offered only to show the defendant's propensity to commit the crime charged. See Tenn. R. Evid. 404(b). Generally, evidence that the accused committed crimes independent of those for which he is on trial is inadmissible because such evidence lacks relevance and invites the finder of fact to infer guilt from propensity. See Moore, 6 S.W.3d at 239; see also Tenn. R. Evid. 404(b). Evidence of other crimes, wrongs, or acts, however, may be admissible for other purposes, such as “ ‘to show identity, guilty knowledge, intent, motive, to rebut a defense of mistake or accident, or to establish some other relevant issue.’ ” Moore, 6 S.W.3d at 239 n. 5 (quoting Hallock, 875 S.W.2d at 292). In this case, the defendant was indicted for prescription fraud, aggravated assault, coercion of a witness, and retaliation for past action. Evidence of efforts to avoid prosecution for a crime is highly probative to establish the intent of a perpetrator. Therefore, we conclude that the evidence of the aggravated assault, coercion of a witness, and retaliation for past action would have been admissible for this purpose at a separate trial for the prescription fraud offense.

Finally, the trial court must also conclude that the probative value of the evidence of other crimes, wrongs or acts is not outweighed by the danger of unfair prejudice to the defendant. Tenn. R. Evid. 404(b)(4). As stated previously, the evidence of the offenses committed after the defendant’s arrest for prescription fraud was highly relevant to the complicity of the defendant in that offense. We conclude that the probative value of the evidence was not outweighed by the danger of unfair prejudice. Therefore, we conclude that the trial court did not abuse its discretion in denying the defendant's motion to sever offenses. The crimes were part of a common scheme to avoid prosecution for the initially charged offense of prescription fraud. As such, they were admissible against one another in separate trials. Furthermore, the danger of unfair prejudice did not outweigh this probative value. Thus, the cases were properly tried jointly. The trial court did not err in denying the pretrial motion for severance.

As to the defendant’s assertion that a severance became even more necessary after the trial court granted the motion for judgment of acquittal on the aggravated assault charge, there is no evidence in the record of any renewed attempt by the defendant to seek a severance of the offenses. Furthermore, we cannot discern how the defendant suffered any prejudice by proceeding with the trial on the remaining charges in light of the jury’s verdicts of acquittal on two of the remaining three counts. Therefore, we conclude that it was not error for the trial court to fail to sever the offenses sua sponte after granting the defendant’s motion for judgment of acquittal on the aggravated assault count.

Instruction for Coercion of a Witness

The defendant alleges that the trial court failed to give a complete instruction regarding the offense of coercion of a witness. Specifically, he claims that the trial court should have instructed the jury regarding the element of influencing a witness to “elude legal process summoning the witness to testify or supply evidence, or to be absent from an official proceeding to which the witness has been legally summoned.” The defendant argues that because Turner had already testified at the preliminary hearing, the issue of further testimony at a subsequent trial was fairly raised and the trial court should have included this element in its instructions to the jury. He acknowledges that he did not make any special request for an instruction at trial, but he claims that this should not result in a waiver of the issue and urges this court to consider this allegation as plain error. The state argues that the trial court correctly instructed the jury regarding coercion of a witness as indicted, that the defendant has waived this issue for failure to raise it contemporaneously at trial, and that if the trial court had instructed the jury all elements in its charge, it would have provided the jury with additional factual bases to convict the defendant, resulting in a conviction nonetheless.

It is incumbent upon the trial court to give a complete instruction of all the elements of the charged offense, whether requested or not. The indictment in this case alleged that the intention of the coercion was to cause the witness to “withhold any truthful testimony or information.” See Tenn. Code Ann. § 39-16-507 (a)(2). Relative to the elements of coercion of a witness, the trial court instructed the jury that:

Number one, that the defendant, by means of coercion, attempted to influence Darrelyn Melissa Turner, a prospective witness in an official proceeding; and number two, that the defendant intended to influence Darrelyn Melissa Turner to withhold any truthful testimony or information.

We conclude that the instruction in this case adequately included all the essential elements of coercion of a witness as it was charged in the indictment. Furthermore, we also conclude that any failure of the trial court to instruct any alternative means of coercion of a witness that were otherwise raised by the evidence was harmless beyond a reasonable doubt because additional instructions would have only provided additional bases upon which to convict the defendant. Therefore, this issue has no merit.

Dismissal of Aggravated Assault Count

The defendant contends that the trial court erroneously related to the jury that the aggravated assault count was dismissed due to a typographical error and caused further prejudice by failing to instruct the jury not to consider evidence regarding this offense as irrelevant to the remaining offenses. The state appeals the trial court’s grant of the motion for judgment of acquittal, arguing that the difference between the date alleged in the indictment and the date proven at trial did not amount to a fatal variance.

An accused is constitutionally guaranteed the right to be informed of the nature and cause of the accusation. U.S. Const. amend. 6, 14; Tenn. Const. art. I, § 9; see Wyatt v. State, 24 S.W.3d

319, 324 (Tenn. 2000). Our courts have interpreted this constitutional mandate to require an indictment to “1) provide notice to the accused of the offense charged; 2) provide the court with an adequate ground upon which a proper judgment may be entered; and 3) provide the defendant with protection against double jeopardy.” Wyatt, 24 S.W.3d at 324 (citations omitted). Further, an indictment is statutorily required to “state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment.” Tenn. Code Ann. § 40-13-202. The question of the validity of an indictment is one of law and, as such, our review is de novo. State v. Hill, 954 S.W.2d 725, 727 (Tenn.1997).

“A variance between an indictment or a subsequent bill of particulars and the evidence presented at trial is not fatal unless it is both material and prejudicial.” State v. Shropshire, 45 S.W.3d 64, 71 (Tenn. Crim. App. 2000) (citing State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984)). A variance is not material when substantial correspondence exists between the proof and the indictment. Shropshire, 45 S.W.3d at 71. When the indictment and the proof substantially correspond, the Defendant is not misled or surprised at trial, and there is protection against a second prosecution for the same offense, the variance is not considered material. Moss, 662 S.W.2d at 592. It is not reversible error when a defendant is sufficiently aware of the charge and is able to adequately prepare for trial. Id.

Tennessee Code Annotated section 40-13-207 provides that “[t]he time at which the offense was committed need not be stated in the indictment, ... unless the time is a material ingredient in the offense.” In State v. Byrd, 820 S.W.2d 739, 740 (Tenn.1991), our supreme court held, “[t]he rule of law is well-established in Tennessee that the exact date, or even the year, of an offense need not be stated in the indictment or presentment unless the date or time ‘is a material ingredient in the offense.’” (quoting Tenn. Code Ann. § 40-13-207). “In fact, in order to establish the legal sufficiency of that charging instrument, the State need only allege that the offense was committed prior to the finding of the indictment or presentment.” Id.

The indictment in this case alleged that the defendant committed aggravated assault on April 7, 2005. The proof at trial showed that the aggravated assault actually occurred on April 8, 2005, the day after the alleged prescription fraud offense. In granting the defendant’s motion to dismiss, the trial court concluded that the difference of one day in the indictment versus the proof at trial amounted to a fatal variance requiring dismissal. With the aforementioned principles in mind, we disagree. The date of the offense was not a “material ingredient” of the offense of aggravated assault. Furthermore, the difference of a single day did not cause the defendant to be misled or surprised in any manner. Therefore, we conclude that the trial court erred in dismissing the aggravated assault count based upon a fatal variance. Having so concluded, we decline to address the defendant’s allegation of error regarding the trial court’s comments and lack of limiting instruction relative to the proof of the aggravated assault. The dismissal of the aggravated assault count is reversed and remanded for a new trial.

CONCLUSION

We conclude that there is sufficient evidence to support the defendant's conviction for coercion of a witness. Furthermore, having found that none of the defendant's remaining alleged errors merit relief, we conclude that the cumulative effect of these alleged errors do not amount to a denial of due process and the defendant's right to fair trial as alleged on appeal. However, we do conclude that the trial court erroneously dismissed the aggravated assault count based upon its finding of a fatal variance. Therefore, the judgment of the trial court convicting the defendant of coercion of a witness is affirmed in all respects. The judgment dismissing the aggravated assault count is reversed and that count is remanded for retrial. The trial court is further instructed to correct the judgment in count one of case number 06CR389 to reflect that the jury acquitted the defendant of prescription fraud.

D. KELLY THOMAS, JR., JUDGE